Federal Court Of Appeal

CANADA

Cour d'appel fédérale

Date: 20091223

Dockets: A-565-07, A-298-08, A-299-08, A-300-08, A-301-08, A-302-08, A-304-08, A-305-08, A-306-08, A-307-08, A-308-08, A-309-08, A-310-08, A-311-08, A-312-08, A-313-08, A-314-08, A-315-08, A-316-08, A-317-08, A-318-08, A-319-08, A-320-08, A-321-08, A-322-08, A-323-08, A-324-08, A-325-08, A-326-08

Citation: 2009 FCA 379

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

JEAN SIMARD et al.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on December 16, 2009.

Judgment delivered at Ottawa, Ontario, on December 23, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.
TRUDEL J.A.

Federal Court Of Appeal

CANADA

Cour d'appel fédérale

Date: 20091223

Dockets: A-565-07, A-298-08, A-299-08, A-300-08, A-301-08, A-302-08, A-304-08, A-305-08, A-306-08, A-307-08, A-308-08, A-309-08, A-310-08, A-311-08, A-312-08, A-313-08, A-314-08, A-315-08, A-316-08, A-317-08, A-318-08, A-319-08, A-320-08, A-321-08, A-322-08, A-323-08, A-324-08, A-325-08, A-326-08

Citation: 2009 FCA 379

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

JEAN SIMARD et al.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] As the saying goes, "Grasp all, lose all". By trying to grasp at too many grounds of appeal, one risks, or ends up, allowing the one or more grounds that do or could have merit to slip away.

[2] In this appeal, the appellants raised no fewer than twenty-six (26) grounds of appeal. It must be noted that in the case at bar, there was little to lose in trying to grasp at too much because, as we

shall see, very few of those grounds of appeal, if any, were worth holding on to. It is therefore unnecessary to give an exhaustive list of those grounds at this stage. For the moment, suffice it to say that the appellants contest each of the findings made by the judge in support of dismissing the appeal. When these findings are referred to in the following analysis of the decision under appeal and of the parties' arguments, some of the grounds of appeal will emerge for consideration.

[3] Mr. Simard's appeal raises similar, if not identical, issues to those in dockets A-298-08 to A-302-08 and A-304-08 to A-326-08 (28 appeals), which were consolidated for a joint hearing. The few variations that there may be between one file or another are in the facts. However, those variations are of no consequence whatsoever, nor do they justify departing from the legal framework common to all of the files.

Facts and proceedings

[4] To describe the dispute, suffice it to say that the appellant, Jean Simard (appellant), invested in tax shelters. He claimed business losses and investment tax credits. After auditing and studying the losses and credits claimed, the Minister of National Revenue (Minister) concluded that they were ineligible. The Minister then issued reassessments for the 1989 and 1990 taxation years.

[5] The appellant appealed against the reassessments in the Tax Court of Canada. The Court heard 64 appeals by 30 appellants. After a hearing lasting some seventeen (17) days, Justice Tardif

of the Tax Court of Canada (judge) rendered a highly detailed judgment one hundred and three (103) pages long.

Analysis of judge's decision and of grounds of appeal and standard of review

[6] In his decision, the judge made every effort to summarize, review and analyze the testimony heard. To this testimony and the documentary evidence available to him, he applied the legal concepts in sections 151, 152(1), (3) and (8), 166, 237.1(1) and 248(1) of the *Income Tax Act*, S.C. 1970-1971-1972, c. 63 (Act) such as they were in the taxation years at issue. These sections read as follows:

151. Every person required by section 150 to file a return of income shall in the return estimate the amount of tax payable.	**151.** Quiconque est tenu de produire une déclaration de revenu en vertu de l'article 150 doit, dans la déclaration, estimer le montant de l'impôt payable.
152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	**152.** (1) Le ministre doit, avec toute la diligence possible, examiner la déclaration de revenu d'un contribuable pour une année d'imposition, fixer l'impôt pour l'année, l'intérêt et les pénalités payables, s'il en est, et déterminer
…	[…]
(3) Liability for the tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.	(3) Le fait qu'une cotisation est inexacte ou incomplète ou qu'aucune cotisation n'a été faite n'a pas d'effet sur les responsabilités du contribuable à l'égard de l'impôt prévu par la présente Partie.
…	[…]
(8) An assessment shall, subject to being varied or vacated on an objection or appeal	(8) Sous réserve de modifications qui peuvent y être apportées ou d'annulation

under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

qui peut être prononcée lors d'une opposition ou d'un appel fait en vertu de la présente Partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire nonobstant toute erreur, vice de forme ou omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

166. An assessment shall not be vacated or varied on appeal by reason only of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act.

166. Une cotisation ne doit pas être annulée ni modifiée lors d'un appel uniquement par suite d'irrégularité, de vice de forme, d'omission ou d'erreur de la part de qui que ce soit dans l'observation d'une disposition simplement directrice de la présente loi.

237.1 (1) "Definitions" – In this section,

"tax shelter" means any property in respect of which it may reasonably be considered having regard to statements or representations made or proposed to be made in connection with the property that, if a person were to acquire an interest in the property, at the end of any particular taxation year ending within 4 years after the day on which the interest is acquired,

(*a*) the aggregate of all amounts each of which is
(i) a loss represented to be deductible in computing income in respect of the interest in the property and expected to be incurred by or allocated to the person for the particular year or any preceding taxation year, or
(ii) any other amount represented to be deductible in computing income or taxable income in respect of the interest in the property and expected to be incurred by or allocated to the person for the particular year, other than any amount included in computing a loss described in subparagraph (i),
would exceed

237.1 (1) « Définitions » - Les définitions qui suivent s'appliquent au présent article :

« abri fiscal » Bien pour lequel il est raisonnable de considérer, à la lumière de déclarations ou annonces faites ou envisagées en rapport avec ce bien, que, si une personne acquérait une part dans ce bien, le montant visé à l'alinéa *a*) excéderait le montant visé à l'alinéa *b*) à la fin d'une année d'imposition donnée se terminant dans les quatre ans après cette acquisition :

a) le total des montants dont chacun représenterait :
(i) une perte qui est annoncée comme étant déductible dans le calcul du revenu, au titre de cette part, et qui pourrait être subie par la personne ou attribuée à celle-ci pour l'année donnée ou pour une année d'imposition antérieure, ou
(ii) un montant qui est annoncé comme étant déductible dans le calcul du revenu ou du revenu imposable, au titre de cette part, et qui pourrait être engagé par la personne antérieure, à l'exclusion d'un montant inclus dans le calcul d'une perte visée au sous-alinéa (i);

(*b*) the amount, if any, by which
(i) the cost to the person of the interest in the property at the end of the particular year,
would exceed
(ii) the aggregate of all amounts each of which is the amount of any prescribed benefit that is expected to be received or enjoyed directly or indirectly in respect of the interest in the property, by the person or a person with whom the person does not deal at arm's length
but does not include property that is a flow-through share or a prescribed property.

b) l'excédent éventuel du coût de cette part pour la personne à la fin de l'année donnée sur la valeur totale des avantages visés par règlement que la personne ou toute personne avec laquelle elle a un lien de dépendance pourrait recevoir, directement ou indirectement, au titre de cette part.

248. (1) "Specified member" of a partnership in a fiscal period or taxation year of the partnership, as the case may be, means

(*a*) any member of the partnership who is a limited partner (within the meaning assigned by subsection 96(2.4)) of the partnership at any time in the period or year, and

(*b*) any member of the partnership, other than a member who is
(i) actively engaged in those activities of the partnership business which are other than the financing of the partnership business, or
(ii) carrying on a similar business as that carried on by the partnership in its taxation year, otherwise than as a member of a partnership,
on a regular, continuous and substantial basis throughout that part of the period or year during which the business of the partnership is ordinarily carried on and during which he is a member of the partnership;

248. (1) « Associé déterminé » s'entend, dans un exercice financier ou une année d'imposition, selon le cas, d'une société, de tout associé qui :

a) soit est commanditaire ou assimilé de la société, au sens du paragraphe 96(2.4), à un moment de l'exercice ou de l'année;

b) soit, de façon régulière, continue et importante tout au long de la partie de l'exercice ou de l'année où la société exploite habituellement son entreprise :
(i) ne prend pas une part active dans les activités de la société, sauf dans celles qui ont trait au financement de l'entreprise de la société, ou
(ii) n'exploite pas une entreprise semblable à celle que la société exploitait au cours de l'exercice ou de l'année, sauf à titre d'associé d'une société;

a) Standard of review applicable to judge's decision

[7] Essentially, the judge's role is to analyze the evidence and make findings of fact on that basis. Then, as already mentioned, the judge applies the law to those findings. We are therefore dealing with findings of mixed fact and law that are open to review if they reveal an overriding and palpable error on the part of the judge: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[8] Under the correctness standard, this Court could intervene only if it were to find one or more erroneous conclusions of law drawn from the facts of the case. I can say right away that in analyzing the reasons for decision and the parties' arguments, I have yet to come across or detect any errors of that nature. This Court's intervention is therefore limited to palpable and overriding errors.

[9] As regards questions of fact, the appellant must establish that the judge "made an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the evidence before the court. The standard of review on such question is very high": *Doubinin v. Canada*, 2005 FCA 298, at paragraph 11.

b) Judge's decision and grounds of appeal

[10] I propose briefly analyzing the judge's decision and the grounds of appeal from two angles: first, the very substance of the decision and the arguments associated with it and, second, the issues related to form, procedure and the Charter.

[11] I must say that the drafting of some of the grounds of appeal makes them difficult to grasp and hence to embrace. I would add that the appellant, both in the Tax Court of Canada and in the appeal now before us, raised what I would call a general argument of deflection to draw attention away from his own conduct and lay the blame on the taxing authority. In this regard, two preliminary remarks are in order.

[12] First, the Tax Court of Canada's jurisdiction in an appeal of an assessment is limited to "deciding whether the assessment complies with the law, based on the facts and the applicable legislation": see *Lassonde v. Canada*, 2005 FCA 323. It does not, as the appellant would have it, have the power to set itself up as critic of the conduct of the Minister or his staff responsible for collecting taxes in the public interest. As the appellant takes the view that he has been wronged by the process that was followed, his remedy lies elsewhere than in vacating an assessment that complies with the Act.

[13] Second, even if it is conceded that the legal concepts used to encourage scientific research and experimental development and give investors tax deductions are hazy and ambiguous, as the

appellant argues, investors would still have to make reasonable efforts to verify the legality and validity of their investments. In other words, the onus is on investors to ensure that they have complied with the conditions set for tax shelters.

[14] That said, as the respondent correctly points out, one must not lose sight of the issue in dispute, that is, whether the appellant was entitled to deduct the business losses and claim an investment tax credit.

[15] Regarding the substance of the dispute, the judge noted that the burden of establishing that the assumptions on which the Minister based the assessment were false rested squarely on the shoulders of the appellant.

[16] He then considered the evidence in order to determine whether the appellant had met the requirements under the Act and could therefore deduct the loss and claim the tax credit.

[17] He concluded as follows:

1. The partnerships Télématique and Écologika were not genuine partnerships within the meaning of Quebec law in force at that time (see paragraph 202 of the reasons for decision);

2. Neither the appellant nor Télématique or Écologika operated a business (*ibidem*, at paragraph 220);

3. The appellant was a passive specified member and limited partner according to subsection 248(1) of the Act and therefore could not claim the business loss and investment tax credit (*ibidem*, at paragraphs 237 and 244); and

4. The scientific research and experimental development projects were not eligible projects, as the partnerships Écologika, Télématique and PC-Dollar had not done any research or incurred any expenses in that regard (*ibidem*, at paragraphs 273, 280, 281 and 282).

[18] The judge's findings are amply supported by convincing evidence, such that under the applicable standard of review, those findings are beyond this Court's power to set aside. Moreover, at trial, the appellant failed to introduce any evidence refuting those findings: *ibidem*, at paragraphs 200, 204, 224, 269 and 272.

[19] Referring to this Court's decision in *Lassonde*, above, and to *Main Rehabilitation Co. Ltd. v. Canada*, 2004 FCA 403, the judge correctly held that he did not have the power to vacate the assessments on the formal, procedural and Charter grounds raised by the appellant, namely, the failure to process his file with due dispatch; negligence by the Canada Customs and Revenue Agency (Agency) in examining his tax return; the Agency's failure to provide him with the information to which he was entitled under Guide RC4213F, dated December 2000 (*Your Rights – In Your Dealings with the Canada Customs and Revenue Agency*); the unreasonable delay in issuing

reassessments and responding to notices of opposition; the waiver of the limitation period allegedly obtained through false and misleading representations; and the resulting oppression he suffered.

[20] That was sufficient to dispose of this entire series of complaints. However, the judge nevertheless took the trouble to analyze each of them on the merits, on the basis of the evidence submitted.

[21] For the most part, the delays of which the appellant complains cannot be attributed to the respondent. At that time, the appellant was represented by a lawyer (now deceased) who was also counsel for the promoter, Normand Lassonde. Although he could have filed an appeal under paragraph 169(1)(*b*) of the Act within 90 days after service of the notice of objection, it was not until 1996 that an appeal was lodged. The lawyer put this appeal and those of the other appellants on hold while a similar test case was being pleaded: see *McKeown v. Canada*, [2001] T.C.J. No. 236 (QL) (T.C.C.).

[22] The appellant's new counsel submits that all the appellants he represents have been punished with staggering interest that has been accruing since the reassessments were issued in 1993 and 1994. Clearly, it was open to the appellants to pay the sum of the assessment and interest, without prejudice, to avoid increasing the debt. Moreover, in a letter to the appellants dated November 23, 1995, officials at the Department of National Revenue (Department) stated that they were willing to agree to [TRANSLATION] "reasonable terms of payment for any tax liability,

including an additional interest-free period, if your financial situation warrants it": Appeal Book, Volume 20, at page 6265.

[23] This letter was intended as a reminder, to those who had not yet accepted it, of the Department's generous settlement offer. In the case of appellant Rémy Lessard (docket A-322-08), his tax liability stood at $13,070.50 as of July 30, 1996. It would have been reduced to $249.05: Appeal Book, Volume 24, at page 7756. On the advice of the promoter, Normand Lassonde, and their counsel at the time — who, I would again point out, was representing both the unscrupulous promoter and the appellants — the appellants refused to accept the settlement offer and pay the interest and tax liability.

[24] In the case of the appellant *per se*, on July 26, 1996, his tax liability was $34,838.05. The Department offered him a reduction of $21,595.46, bringing his liability to $13,242.59: *ibidem*, at page 7791.

[25] The appellant, like other appellants, was in an unenviable, if not deplorable, situation. However, like the others, he was the architect of his own misfortune in making his tax situation even worse. Having found that the alleged breaches were not attributable to the Agency, the judge exercised his discretion to refuse to recommend that the Minister consider a remission of the tax, penalties or interest under subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11: see paragraph 403 of the reasons for decision. In the circumstances, I cannot conclude that he exercised his discretion improperly.

[26] Finally, some of the appellants signed waivers of the limitation period under subparagraph 152(4)*a*)(ii) of the Act. Their counsel alleges that these waivers were obtained by means of false promises to the effect that Mr. Lassonde could meet with a special committee to put forward his arguments about the appellant's specified member status. On the strength of the evidence before him, the judge held that "they, too, were offers made in good faith in order to give [Mr. Lassonde] one last chance to state his case": *ibidem*, at paragraph 388.

[27] At any rate, the assessments were ready: *ibidem*, at paragraph 389. In the absence of a waiver, the appellants concerned would have been assessed immediately. Therefore, they were not prejudiced in any way: see *Jobin v. Canada*, 2007 FCA 408, 2008 D.T.C. 6055, at paragraph 25.

Conclusion

[28] For these reasons, I would dismiss the appeal with costs payable jointly and severally by the appellant and the appellants in dockets A-298-08 to A-302-08 and A-304-08 to A-326-08. However, given the joint hearing for all of the appeals, I would limit costs to a single set.

[29] A copy of these reasons will be placed in each of the other appeal files (A-298-08 to A-302-08 and A-304-08 to A-326-08) in support of the judgment to be rendered therein.

Gilles Létourneau
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
Johanne Trudel J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: **A-565-07**, A-298-08, A-299-08, A-300-08, A-301-08, A-302-08, A-304-08, A-305-08, A-306-08, A-307-08, A-308-08, A-309-08, A-310-08, A-311-08, A-312-08, A-313-08, A-314-08, A-315-08, A-316-08, A-317-08, A-318-08, A-319-08, A-320-08, A-321-08, A-322-08, A-323-08, A-324-08, A-325-08, A-326-08

STYLE OF CAUSE:	JEAN SIMARD et al. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	December 16, 2009
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	RICHARD C.J. TRUDEL J.A.
DATED:	December 23, 2009

APPEARANCES:

Normand Roy	FOR THE APPELLANTS
Pierre Cossette Philippe Dupuis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Saint-Augustin (Québec)	FOR THE APPELLANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT